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IN THE

Supreme Court of the United States

October Term, 1949
No. 666.

MONOLITH PORTLAND MIDWEST COMPANY, a corporation,
Petitioner,

vs.

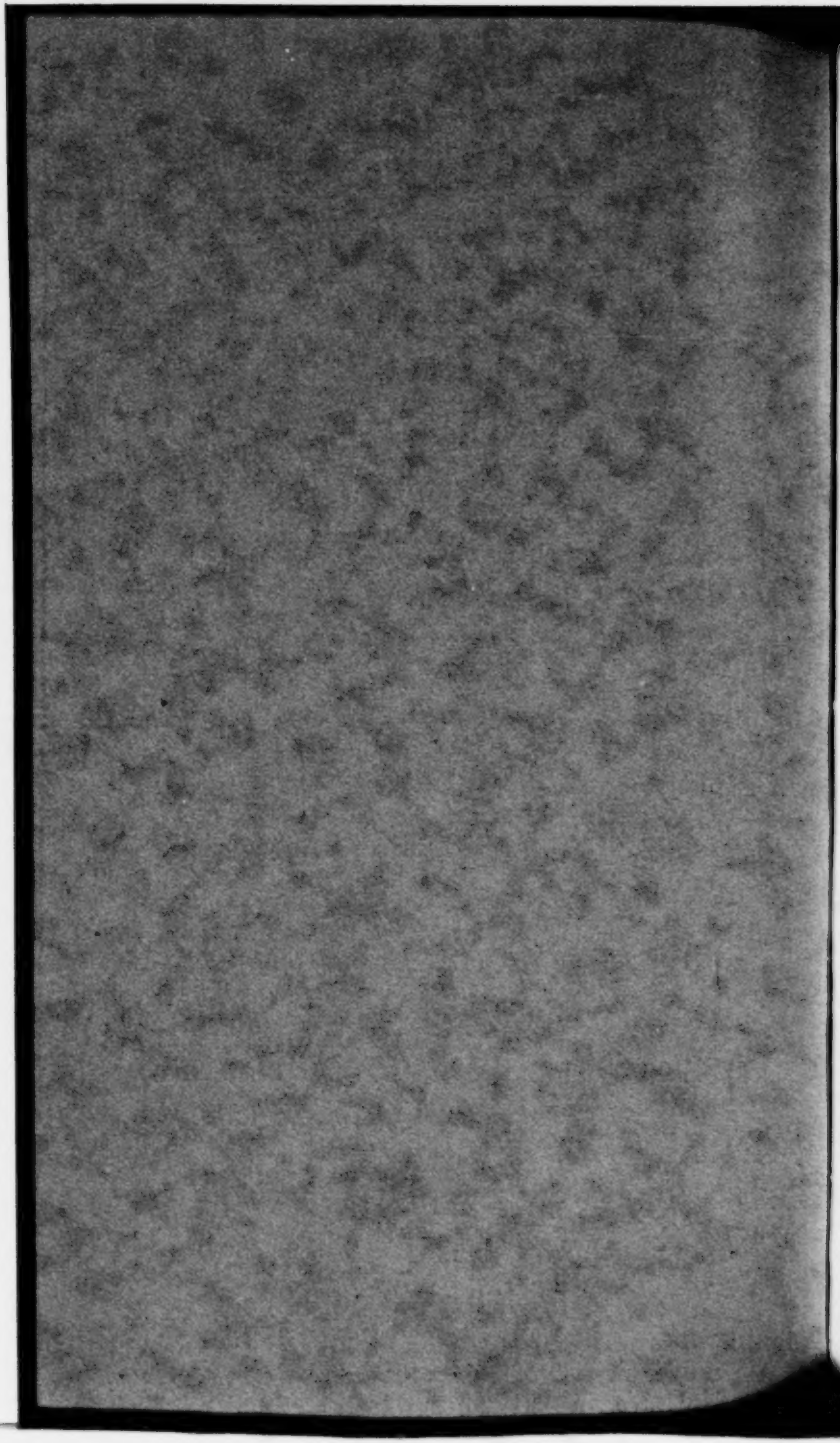
RECONSTRUCTION FINANCE CORPORATION, a corporation,
Respondent.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Summary Argument in Accordance With Rule 38 in Support of Petition for Certiorari.

WELBURN MAYOCK and
JOSEPH T. ENRIGHT,
541 South Spring Street,
Los Angeles 13, California,
Counsel for Petitioner.

Of Counsel for Petitioner:
ALFRED L. BLACK, JR.,
DONALD J. DUNNE.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.



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Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Summary Argument in Accordance With Rule 38 in Support of Petition for Certiorari.

Your petitioner, Monolith Portland Midwest Company, alleges that the Petition for Certiorari was denied on April 10, 1950. That petition is made an appendix to, and is thereby realleged in support of this Petition for Rehearing.[1]

Your petitioner succinctly and briefly submitted an argument in support of that petition. The office of the Solicitor General, in failing to reply to the questions presented,

[1]Petition for rehearing is properly applied to an order denying certiorari. *Simpson v. Commissioner,* 321 U. S. 226, 88 L. Ed. 688.

reasons relied upon, and points of petitioner's argument, committed the same error as did the Honorable Ninth Court of Appeals. The Solicitor's error factually lies in his comparison of the contract in the instant case (there being only four such experimental contracts awarded in the entire aluminum-from-clay program [R. 453]), with the 319,835, being 99.9% of the 320,093 war procurement production contracts which were as of December 31, 1949, administratively settled under the Contract Settlement Act of 1944.

Argument.

The decision sought to be reviewed herein is a political decision and not a legal one. The reason given for the decision discloses that it was policy and not law which motivated the court and that the decision was based on that ground. In its effort to constitute itself an "arm of executive power" the learned Ninth United States Court of Appeals used the device of interpretation where no ambiguity or doubt existed to amend the War Mobilization and Reconversion Act by judicial deletion of significant language.

It is respectfully urged that this decision if permitted to stand will approve the dangerous doctrine that courts in America may forsake their classic function of declaring what the law is and under the mask of interpretation, may enter the field of legislation and change of statute, so as to assist in the implementation of an executive design.

Mr. Justice Jackson stated the concept of a court which we respectfully approve in a speech before the American

Law Institute on May 20, 1948, as reported in A. B. A. Journal, Vol. 34, pp. 535-6, as follows:

> "The concept which dominates all Communist teaching has been stated by Soviet authority in these simple words: 'The Court has been, and still remains, as it ought to be according to its nature—namely, one of the organs of governmental power, a weapon in the hands of the ruling class for the purpose of safeguarding its interests.' "
>
> ". . . Our concept of the Court presupposes its acceptance of decisions on policy by the legislative majorities that from time to time prevail, except where an overriding policy is set forth in the Constitution."

So serious a charge should be substantiated by proof and not mere assertion.

That the learned court was concerned with policy is shown by its own words. The decision shows [R. 549] that it was concerned with the number of contracts of a similar character that were involved, set the number at 100,000 or more and said that if such a mass of litigation were to be taken to court it would swamp the judiciary.

It is most respectfully urged that when the contractual rights of litigants are submitted to a court for decision, the number of similar contracts that exist and the impact thereof on the Judiciary is a question of policy, not of law. If the law is inadequate, it is the duty of Congress to correct it—not for the Court to do so.

In the instant case the learned Court erred in the matter of the policy involved. The contract in the instant case was not among the 100,000 contracts the learned

court wished to settle administratively under the Contract Settlement Act rather than judicially. The vast majority of "prime contracts" were "prime contracts for war production." We are not concerned with this mass of contracts. The War Mobilization and Reconversion Act of 1944, Sec. 202, and the Contract Settlement Act of 1944 together provide a system of termination and administrative settlement for "prime contracts for war production." Our contract is among the relatively few which, although "prime contracts," are not "prime contracts for war production." Our contract is a prime contract for experimentation.

Director Bunker of the Aluminum Division accurately defined the present contract as follows:

> "It should be understood that this plant is an experimental unit with the sole objective of determining whether or not the process can be applied successfully to the production on a large scale of alumina from anorthosite and/or clay." [R. 460.]

Other prime contracts which are outside the act as not being "prime contracts for war production" would be "prime contracts for non-production services," "prime contracts for transportation," prime contracts for sale of articles not produced by the seller. There are probably many others.

It should be noted that the Contract Settlement Act of 1944 (Public Law 395) (Chapter 358) was already passed when the War Mobilization and Reconversion Act of 1944 was passed. (Public Law 458) (Chapter 480).

Thus the term "prime contract" had already been defined in the Contract Settlement Act when the term "prime contract for war production" was used in Section 202 of

the War Mobilization and Reconversion Act of 1944. The terms are not equivalents. The term "prime contract for war production" is a certain type or class of contract within the general term "prime contract." The words "for war production" were placed in the statute to distinguish the type of prime contract with which Section 202 proposed to deal from other types of "prime contracts" with which it was not concerned.

The holding by the learned Court that the two terms were equivalent had the effect of deleting the words "for war production" from the text of Section 202 (*supra*), wherever the term was used therein. This constitutes legislation, pure and simple, and is not a valid exercise of the judicial process, assuming that there is a shred left to the doctrine of the separation of powers as set forth in the Constitution of the United States.

A reading of Title II, denominated Demobilization and Reconversion Policies, discloses that a particular type of operation was considered. Only one type of prime contract exists which will make Title II (*supra*) logical and sensible. It referred to the situation where a contracting agency contracted with a particular plant owner to produce certain articles of war procurement in his plant. The demobilization policies being set were to effect a change-over of the production of such a plant so as to permit it to produce for non-war use.

In no other category of prime contract do the words make sense. They use the term "work in process"—this term refers to parts for an assembly line, or partially completed articles of production—any material upon which work has been done for use in an item of production.

The term "work in process" is keyed to the term "prime contract for war production" in Section 202 because "work in process" under any *such* contract is referred to. The words *such contract* cannot mean any prime contract because they are used in the single sentence which makes up Section 202 and refer to the only type of contract mentioned therein, to-wit: "prime contracts for war production."

The words would not be appropriate to apply to a *prime contract for services,* a *prime contract for transportation,* or a prime contract for experimentation or research.

They are clearly referring to the production items of a plant which are being produced for war use. They distinguish such production items from production for non-war use.

Later they refer to the contracting agencies being obligated to survey their *"product and material requirements."* Again items of war procurement under prime contracts for production are clearly indicated.

The whole Title clearly refers to the establishing of policies concerning prime contracts for war production,[2] such as have been indicated, and makes mandatory the

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[2]The Solicitor General further erred in his comparison of war production contracts with national defense contracts. This Court properly took judicial notice of the situation in 1916, in *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 80 L. Ed. 688, and determined that a contract involving a project to construct a dam to create power to produce munitions during War I, was at the time of the decision in 1936 a part of the national defense assets for use in the event of a future war. As power for munition production during War I was, so also is an experimental project to develop a domestic supply of the strategic war metal aluminum a part of the continuing national defense.

establishing of policies for the change-over of plants engaged in producing war items to plants producing non-war items and an orderly return to peace activity.

Thus the stated anxiety of the learned Court lest the Judiciary be swamped with cases was really without foundation. It was the Court's own error of holding that the term "prime contract" and the term "prime contract for war production" meant the same thing which raised the policy problem.

It is a familiar axiom of mathematics that the whole is equal to the sum of all its parts. As a corollary it follows that a part is less than the whole. The learned trial court has disagreed with this corollary and held that a part of the whole term "prime contract" is equal to the whole term. We have demonstrated that such a holding is erroneous and that it was unnecessary to go to the length the Court did to protect what it considered a matter of policy.

Since the Court has held that our contract is a *contract for experimentation,* by acknowledging that the motivation for the contract was to determine the feasibility of commercially extracting aluminum from our native anorthosite ores [R. 544], it is not a *contract for war production.* Since it is not a contract for war production, it cannot be terminated under Section 202 of the War Mobilization and Reconversion Act of 1944 which legislates exclusively in the field of contracts for war production.

Therefore the termination of the contract by Reconstruction Finance Corporation under the authority of Section 202 (*supra*) was an unauthorized nullity. It follows that our contract is merely one which has been breached by Reconstruction Finance Corporation; that no

administrative procedure for its settlement has been imposed by Statute, and that a suit for injunctive and other relief is the proper course for the party aggrieved.

Wherefore, petitioner respectfully prays that this Honable Court rehear the Petition for Writ of Certiorari and grant it as prayed.

Respectfully submitted,

MONOLITH PORTLAND MIDWEST COMPANY,
a corporation,
WELBURN MAYOCK, and
JOSEPH T. ENRIGHT,
By WELBURN MAYOCK,
Counsel for Petitioner.

Of Counsel for Petitioner:

ALFRED L. BLACK, JR.,
DONALD J. DUNNE.

Certificate of Counsel.

The undersigned hereby certify that this Petition is presented in good faith and not for delay, and in the opinion of counsel is upon intervening substantial grounds.

WELBURN MAYOCK, and
JOSEPH T. ENRIGHT,
By WELBURN MAYOCK,
Counsel for Petitioner.

APPENDIX.

In the Supreme Court of the United States, October Term, 1949.

Monolith Portland Midwest Company, a corporation, Petitioner, vs. Reconstruction Finance Corporation, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Ninth Circuit, entered on the 21st day of December, 1949.

OPINION BELOW.

The Court of Appeals Opinion is reported at 178 F. 2d 854 [R. p. 543].

JURISDICTION.

The jurisdiction of the Court is invoked under Section 240 of the Judicial Code, as published in 28 U. S. C. A. Section 347a—1948 Edition.

LAWS INVOLVED.

The Contract Settlement Act of 1944 (41 U. S. C. A. Sections 101, *et seq.*);

The War Mobilization and Reconversion Act of 1944 (50 U. S. C. A. App., Sections 1651, *et seq.*);

Rules 12 and 56 of the Federal Rules of Civil Procedure, promulgated by this Court and the due process requirement of the Fourteenth Amendment to the Federal Constitution.

Questions Presented.

This petition presents for review:

(1) The first Federal Appellate Court decision interpreting the above war statutes in basic particulars;

(2) Whether or not an experimental contract—which provided for a trial run of a process, which would, if successful, permanently end our Nation's dependence upon overseas shipment of bauxite (the basic raw material needed in alumnia manufacture)—is a prime contract for war production within the War Mobilization and Reconversion Act of 1944;

(3) If the contract is a prime contract for war production, is the procedure of the Contract Settlement Act of 1944 elective, exclusive, or did Congress in fact provide therein that none of the contractor's rights either substantively or procedurally should be impaired thereby?

(4) Has the Petitioner been denied its day in Court by a summary dismissal upon an issue not pleaded, which was caused by and resulted from a misconstruction of this Court's decisions as to the proper use of affidavits upon a motion to dismiss?

Reasons Relied Upon.

I.

The Contract Settlement Act of 1944, and the War Mobilization and Reconversion Act of 1944, constitute important legislation which has not been considered by this Court. New and important Federal questions are presented:

(a) The District Court held that the questions involved were new and novel, and that irreparable damage might be sustained in the event of a reversal of its judgment [R. pp. 511, 513];

(b) The Court of Appeals found no Federal case in point and relied upon a Supreme Court of Minnesota decision. *Stevens v. Federal Cartridge Corporation*, 226 Minn. 148, 332 N. W. 2d 312;

(c) This Court, in the case *Lichter v. U. S.* (1948), 334 U. S. 742, 68 Sup. Ct. 1294, 92 L. Ed. 1694, said that the Congressional approach involved in World War II legislation was a departure from its policy for World War I;

(d) The war conversion legislation and policies of Congress related thereto should be rendered clear and certain, as national economic health is involved as well as our national ability to gain quick and efficient industrial support in any emergency effort found to be needed to put industry back into another war effort; and

(e) The subject matter of this contract was a gigantic effort to permanently better our national industrial economy and our national defense necessities.

II.

The decision, if permitted to stand, will form a precedent for the proposition that a Federal Court, under the guise of interpretation, may amend a clear and unambiguous provision of a statute by deleting significant words therefrom.

III.

That prompt clarification of the litigants' rights is important, as, if the property involved were disposed of prior to the final conclusion of litigation, Respondent could lose from seven to twelve millions of dollars needed to reconstruct the plant, or Petitioner could lose, even if successful, the time involved in constructing the plant in addition to the added exhaustion of the life of its patents.

IV.

The decisions of this Court and the rules of Federal procedure were misconstrued and misapplied in the dismissal of this action without any issue supporting it.

STATEMENT OF THE CASE.

Petitioner and Respondent's predecessor agreed to construct a plant and to test therewith the feasibility of extracting alumina from its abundant source in the clays of this Nation [R. pp. 20-68].

Petitioner was to furnish the process, its knowledge concerning clay processing, and to provide the necessary personnel to supervise the acquisition of the needed properties and the designing, constructing and operating of the experimental test plant.

Respondent was to provide in advance the amounts of money required for the acquisition of the necessary properties, the designing and constructing of the plant, and for the cost of a test run of the plant.

The consideration to be received by Petitioner was:

(1) Any increase in the value of its process resulting from the test run;

(2) An option to purchase the plant after the completion of the test run; and

(3) A nominal fee during the period of the test run.

The consideration to be received by Respondent was:

(1) A plant constructed at cost;

(2) And operated for a trial period at direct cost plus a nominal fee;

(3) A right to the further services of Petitioner at cost; and

(4) A license for the use of the process in this and other plants.

On July 24, 1946, when construction of the plant was nearing completion, Respondent terminated the contract by a notice to Petitioner directing Petitioner to cease construction of the plant [R. p. 166]. The next day by telegram and letter Petitioner notified Respondent of its claims for this breach, money paid out in performance, and asked Respondent to advise its desires [R. p. 438]. They immediately conferred and on August 21, 1946, Petitioner again in writing made claims in the event Respondent would not permit Petitioner to continue in possession of the plant to test the process [R. pp. 440, 443]. On September 10, 1946, Respondent gave another and final notice of cancellation of the contract [R. p. 69]. On October 21, 1946, Respondent removed part of the equipment from the plant, which equipment was necessary to test the process [R. p. 13].

On November 7, 1946, Petitioner filed suit in the State of California, seeking a declaration of its rights, an injunction to maintain the *status quo* of the property, and for damages. The suit was removed to the United States District Court Respondent by its answer admitted the removal of the equipment [R. p. 102], and at no time has it pleaded by answer that the contract was a prime contract for war production or that Petitioner has in any manner failed to exhaust an administrative procedure [R. pp. 95, 208]. On February 13, 1947, Petitioner received notice from Respondent that it intended to declare the plant and its equipment surplus [R. p. 128], as a preliminary to its disposal. Upon Petitioner's application, the District Court issued, on February 25, 1947, its preliminary injunction restraining the Respondent from declaring the plant to be surplus and ousting Petitioner from possession of the plant and directing and maintaining a *status quo* [R. p. 139].

On December 30, 1947, Respondent for the first time by motion supported only by the conclusions contained in an affidavit of its associate director [R. p. 399] sought the dismissal of the action. The grounds were that Petitioner had not exhausted an administrative process it asserted was created by the Contract Settlement Act, and that the War Mobilization and Reconversion Act authorized the cancellation of this contract [R. p. 397].

Petitioner resisted this motion by allegations of its pleadings, affidavits and an amendment to its complaint, all of which created many important ultimate issues of fact, including,

> "whether or not Petitioner had an election and/or had exhausted the administrative provisions of the Contract Settlement Act,"

and

> "whether or not the contract was a prime contract for war production within the provisions of the War Mobilization and Reconversion Act," [R. pp. 434, 450, 461, 502].

On January 25, 1949, the District Court dismissed the action [R. p. 505]. On February 10, 1949, the District Court continued the preliminary injunction in force pending final determination of this cause, because it found that new and novel questions of law were involved, which had not been decided by a United States court of appellate jurisdiction, and that irreparable damage might result in the event of a reversal of the case [R. p. 513].

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Ninth Circuit, commanding that

Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 12,200, Monolith Portland Midwest Company, Appellant, vs. Reconstruction Finance Corporation, Appellee; and that said judgment of the United States Court of Appeals for the Ninth Circuit and the judgment of the United States District Court for the Southern District of California, Central Division, be reversed by this Honorable Court and that your Petitioner may have such other and further relief as to this Honorable Court may seem meet and just.

Respectfully submitted,

MONOLITH PORTLAND MIDWEST COMPANY,
a corporation,

WELBURN MAYOCK and
JOSEPH T. ENRIGHT,

Counsel for Petitioner.

Of Counsel for Petitioner:

ALFRED L. BLACK, JR.,
JOSEPH T. ENRIGHT,
DONALD J. DUNNE.

In the Supreme Court of the United States, October Term, 1949.

Monolith Portland Midwest Company, a corporation, Petitioner, vs. Reconstruction Finance Corporation, a corporation, Respondent.

SUMMARY ARGUMENT IN ACCORDANCE WITH RULE 38 IN SUPPORT OF PETITION FOR CERTIORARI.

PETITIONER CONTENDS THAT WAR CONVERSION LEGISLATION AND CONGRESSIONAL POLICIES SHOULD BE RENDERED CLEAR AND CERTAIN TO PROTECT THE ECONOMIC HEALTH OF THE NATION AND ITS ABILITY TO QUICKLY AND EFFICIENTLY MOBILIZE FOR ANY EMERGENCY.

I.

THEY CONSTITUTE A NEW APPROACH.

The Congressional policy for World Wars I and II has been compared by this court in *U. S. v. Bethlehem Steel,* 315 U. S. 289, 308, 86 L. Ed. 855, 867, and *Lichter v. U. S.,* 334 U. S. 742, 92 L. Ed. 1694, and it was there decided that the principal difference between the government's handling of contracts during the first war and during and after the second war was that there should be no legal taking of any of the rights of the contractor arising during or in connection with the prosecution or conclusion of the second World War.

The Court of Appeals failed to carry this policy into effect when it judicially interpreted the provisions of the War Mobilization and Reconversion Act of 1944 (hereafter referred to as W.M.A.).

The W.M.A. authorized the contracting agencies to terminate certain contracts by virtue of Section 202 (50 U. S. C. A. App. 1657), which is as follows:

> "Any contracting agency shall terminate prime contracts for *war production* whenever in the opinion of the agency the performance under such contracts will not be needed for the prosecution of the war. . . ." (Emphasis added.)

The appellate decision starts itself off by assuming that the main question is whether a contractor may sue "The United States for damages." The Reconstruction Finance Corporation is not the United States.

Proceeding from this sovereign status assumed by the Court of Appeals, it was easy for it to assume all other questions, such as the nature of the contract and its remedies to be in favor of R.F.C.'s position.

The prime error is that this contract between private corporations is of no interest to the United States Government proper except as it has been made such by virtue of Section 202 of W.M.A.

It could not be made of interest within that Act unless it were in fact and were found to be a "prime contract for war production." War production is the keynote to the termination power given by Section 202 and in many places in the Act production is specified as the only thing being considered.

The Court of Appeals was led to an extreme position when it held that Section 20(b) of Contract Settlement Act of 1944 (hereinafter referred to as C.S.A.), authorized a C.S.A. created body to pre-judge what should or not be classed as a contract for war production under Section 202 of the termination statute.

The Court of Appeals ignored the basic policy-fixing section in C.S.A., being Section 20(e) which is as follows:

> "Nothing in this Act shall be deemed to impair or modify any war contract or any term or provision of any war contract or any assignment of any claim under a war contract, without the consent of the parties thereto, if the war contract, or the term, provision, or assignment thereof, is otherwise valid."

The Court of Appeals' decision that the Act is a mandatory remedy is diametrically opposed to this limitation in Section 20(e) that the Act shall not be used "to impair the rights of any contractor."

The Court of Appeals of necessity was precluded from noting or considering Section 20(e) if it were to hold the contractor's rights were by C. S. A. to be impaired to the extent that they must confine their remedies to C.S.A.

The court's opinion is not supported by the record in that part in which it bases its decision upon the practical considerations attending the existence of 100,000 War Department contracts. There were but four experimental contracts, of the kind considered herein, awarded in the entire aluminum-from-clay program [R. p. 453]. This experimental contract was succinctly and accurately described and defined by Director Bunker of the Aluminum Division as follows:

> "It should be understood that this plant is an experimental unit with the sole objective of determining whether or not the process can be applied successfully to the production on a large scale of alumina from anorthosite and/or clay." [R. p. 460.]

II.

The Record Does Not Sustain the Opinion.

The Court of Appeals' decision erroneously concluded that ninety days had not passed after Petitioner's notice, accompanied by an offer to negotiate, had been given of its termination claim. This is contrary to the record as it shows that on July 24, 1946 [R. p. 166] Respondent "terminated" Petitioner's contract within the language of Subsection (d) of Section 3 and Subsection (b) of Section 11 of C.S.A., which provides that the whole or any party of work being terminated or suspended constitutes a termination within C.S.A.

On July 25. 1946, Petitioner advised Respondent that it intended to present a termination claim and offered to negotiate in connection therewith [R. p. 438]. The Court of Appeal's statement that the only intent that can be gathered from the letters giving notice is that Petitioner will seek *"damages"* if Respondent fails to perform, would seem to make it rather difficult to distinguish this from a notice that Petitioner was intending to present a termination claim. This, however, was the particular in which the Court of Appeals justified itself by its asserted unwillingness to engage in legal legerdemain.

This statement in the opinion is on a par with the reference to these two letters by the Court of Appeals [R. p. 552], when it said that these letters were "written after Appellant received instructions to suspend work on the plant" but "prior to the date it was notified that the contract was terminated." This glaring overlooking of

C.S.A. Sections 3(d) and 11(b) emphasizes two things. The first is that the Court of Appeal's approach was that it was reviewing a damage claim against the United States, and the other, the futility of attempting to correctly decide cases upon issues not made by the pleadings. But a slight consideration of these two sections of the statute would have quickly found therein that, as to C.S.A., a termination is said to be "to cease or suspend all *or a substantial part of the work*" without terminating the contract. Giving the proper effect to these parts of the statute in its analysis would have compelled the Court of Appeals to reverse the case as its stated premise would then demonstrate that the termination was actually followed by a notice that Petitioner would claim damages for termination and that it was willing to negotiate and,—that more than ninety days had elapsed thereafter prior to suit.

On November 7, 1946, or one hundred five (105) days after this Petitioner had advised Respondent of its intention to make a termination claim by claiming damages, and indicated a willingness to negotiate,—this court action was filed [R. p. 77]. If this had been considered by the Court of Appeals, it would have been a complete answer to its inquiry as to the expiration of ninety days in connection with any part of C.S.A.

The Court of Appeals erred in not considering Petitioner's presentation of proofs concerning reimbursables as being in this regard a compliance with C.S.A. Such suppression of the record permitted the Court of Appeals to say these were included within C.S.A. for penal pur-

poses without giving the legal advantage which came from the admitted proof of filing, negotiations and requests in connection therewith. These were completely adequate, as shown by the record, upon any theory which could be claimed as to compliance with C.S.A. provisions, and admittedly had occurred many times prior to the ninety days preceding the filing of the case.

Ignoring Section 20(e), and assuming this to be a "prime contract for war production" and that sovereignty was granted by C.S.A. to any act performed by R.F.C. in disposing of its contractual liabilities it found on its books at the end of World War II, enabled the court to ignore the plain statement of intent of Congress as follows:

> "*Remedial Provisions:* A further feature of the bill that deserves approval is that relating to the rights of claimants. A procedure has been set up that will, in my opinion, give any claimant every reasonable right to obtain justice without going into court with the consequent expense and delay, yet if the claimant does not wish to avail himself of such procedure there is nothing in this bill to prevent him from going into court to establish any right that he feels belongs to him—or such claimant may avail himself of the procedure provided in the act, designed for speedy settlement of the claim, and if not satisfied may then go into court. *No existing remedy that a claimant now has under the law is taken from him, but in addition thereto he is given an opportunity to avail himself of a settlement procedure that can facilitate*

his settlement if he so desires. This is fair and just to all parties concerned, Government and claimant." (Congressional Record, Vol. 90, Part 5, 78 Congress, Second Session, p. 6153.) (Emphasis added.)

III.

Misapplication,—Court's Summary Procedure Rules.

The Court of Appeals ignored Rule 12 of the Federal Rules of Civil Procedure established by this court. It specifically provides that a motion to dismiss, for failure to state a claim upon which relief can be granted (failure to exhaust an administrative remedy) shall be treated as a motion for summary judgment and disposed of as provided by Rule 56. Recently this court in *Fountain v. Fillson,* 93 L. Ed. Ad. Op. 768, approved the holding in *Farrel v. District of Columbia* (U. S. Ct. of App. D. C.), 153 F. 2d 647, 648, that under Rule 56 affidavits can be used only for the purpose of discovering whether there is an issue of fact and not for deciding such an issue. The record contains no pleading upon the issue as to whether or not Petitioner complied with provisions of C.S.A. yet the dismissal was upon this ground, and all this notwithstanding Petitioner's affidavits which Petitioner believes demonstrated that it had complied with C.S.A. [R. pp. 434, 450].

This disregard of this court's rules, is matched by a disregard of the statutory provision in C.S.A., Section 13[c][3] which limits the trial court's authority to a "remanding" or retaining for trial the controversy.

IV.

Great and Far-reaching Consequences Possible.

A review of the Court of Appeals' opinion is necessitated by the importance of the subject matter here involved. Alumnia is in great and needed demand for industrial and defense purposes. It is produced from a raw material called bauxite, substantially all of which is imported. This venture was an effort to permanently solve this domestic shortage [R. pp. 465, 490].

The official agency of the U. S. Government best qualified to pass upon the problem has published this report upon Petitioner's process:

> "Small-scale laboratory tests supplemented by pilot-plant runs have demonstrated that the alumina and soda occurring in the Wyoming anorthosite from the Laramie Range can be extracted and recovered satisfactorily by the lime-soda process." [R. p. 501.]

It may be added that Respondent has not disagreed with this Bureau of Mines position.

The record definitely shows that enemy submarines had reduced our needed imports of bauxite (approximately 3,000,000 tons per year) [R. p. 451] early in World War II to dangerous proportions. It surely requires no proof at this time to convince:

(1) that the threat of the next war carries with it just as great an enemy submarine menace, and

(2) that the time taken, four years [R. pp. 451 and 166], to bring this experimental plant to "near comple-

tion" could conceivably be many times greater than a kind providence would allow for a solution of this shortage in the next holocaust. This, added to the staggering losses to the parties herein which could result from a premature divorcing of this plant from the process it was intended to test, would, we respectfully urge, be a reason to hope that this record may be found worthy of review by this court.

Respectfully submitted,

MONOLITH PORTLAND MIDWEST COMPANY,
a corporation,
WELBURN MAYOCK and
JOSEPH T. ENRIGHT,

Counsel for Petitioner.

Of Counsel for Petitioner:

ALFRED L. BLACK, JR.,
JOSEPH T. ENRIGHT,
DONALD J. DUNNE.